SYDNEY DOWTON

IBLA 99-344 Decided April 19, 2001

Appeal from a decision of the Challis, Idaho, Resource Area Manager, Bureau of Land Management, assessing fees and damages for the unauthorized use of public lands. IDI-32963.

Set aside and referred for a hearing.

1. Accretion--Administrative Procedure: Hearings-- Avulsion--Hearings--Rules of Practice: Appeals: Hearings

A BLM decision assessing fees and damages for the unauthorized use of public land will be set aside and referred for a hearing where the record contains significant unresolved factual and legal issues concerning whether the subject land was created by accretion or avulsion and who has title to the land.

APPEARANCES: William G. Myers, III, Esq., Boise, Idaho, for appellant; Gloria Romero and Renee Snyder, Challis Resource Area Office, Bureau of Land Management, Salmon, Idaho, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Sydney Dowton 1/ appeals the June 4, 1999, notice of trespass issued by the Challis, Idaho, Resource Area Manager, Bureau of Land Management (BLM), assessing him fees and damages for the unauthorized use of public land described as lots 2 and 5 north of the present course of the Salmon River, sec. 26, T. 16 N., R. 20 E., Boise Meridian, Custer County, Idaho, denominated by BLM as parcel 1. 2/

1/ Although the notice of appeal lists both Sydney and Karen Dowton as appellants, the challenged decision named only Sydney Dowton. For consistency, we will refer to Sydney Dowton, singularly, as the appellant.

2/ On May 27, 1999, BLM issued Dowton a trespass decision addressing his unauthorized use of additional public land in secs. 23, 26, 27, and 35, T. 16 N., R. 20 E., Boise Meridian, identified as parcels 2 through 5 (IDI-25253). Dowton appealed that decision and that appeal has been docketed as IBLA 99-357. Because Dowton challenged the Government's ownership of parcel 1, BLM treated that parcel as a separate trespass case and issued the decision subject to this appeal (IDI-32963). We similarly consider the appeals as separate appeals.

Dowton has owned the Ellis Ranch adjacent to parcel 1 since 1971 and runs a livestock operation on that land. On June 28, 1993, BLM issued Dowton a notice to cease and desist, alleging that Dowton had committed a trespass by clearing and plowing parcel 1 for agricultural purposes. Further, BLM advised Dowton that he was liable for the fair market value rent of the lands, rehabilitation/stabilization of the damaged lands, and administrative costs associated with his unauthorized use. The notice provided him 15 days to settle the trespass liability or present evidence showing that he was not a trespasser.

Dowton and BLM met on July 13, 1993, to discuss the notice. Dowton told BLM that he believed the land he was farming in parcel 1 was his private land, and stated that he would not agree it was public land unless BLM offered him that land in exchange for his Big Hat Creek property. Hence, BLM considered Dowton to have complied with the notice and decided to take no further action until it evaluated the impact of farming on the land's resources and reached a decision. See Statement of Reasons (SOR), Exh. 5 (July 13, 1993, Conversation Record).

In the winter of 1995, BLM learned that a center pivot irrigation system had been placed on parcel 1. On February 22, 1995, BLM requested an appraisal of the resource damages to the land caused by Dowton's clearing of riparian vegetation, planting and seeding of alfalfa with a cover crop of oats and peas, and installation of a center pivot irrigation system. The resulting appraisal report, dated March 13, 1995, and approved March 15, 1995, concluded that the loss in market rent due the United States occasioned by the unauthorized agricultural use of the estimated 30 acres in parcel 1 was $900 ($30/acre x 30 acres), and that the damages to the land, which the report defined as the loss in market value of the parcel caused by the removal of the native vegetation, was $25,500 ($850/acre x 30 acres). See SOR, Exh. 6.

On April 27, 1995, BLM's Idaho State Office Cadastral Survey Division issued a memorandum addressing the question of whether the lands in lots 1-5, sec. 26, T. 16 N., R. 20 E., Boise Meridian, included within parcel 1 had been created by avulsion. After reviewing the survey plats and the field notes and files for Survey Groups 657 and 843, the Cadastral Survey Division stated:

> 1. A portion of the township, including Section 26, was originally surveyed by James M. Porter, plat approved March 9, 1894.
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> 2. In 1956, the remaining portion of the township subdivisions were completed, plat approved April 4, 1958. Neither section 26's section lines nor the Salmon River meander lines were completely resurveyed in this survey. However, the plat shows some change in the Salmon River location. The plat memorandum explains this with the quote "Topography within sections

compiled from aerial photographs and coordinated with section line control obtained during survey." This plat shows what appears to be an avulsion in the area of lots 1-5 with the original meanders indicated by dashed lines and current (1956) river location by solid lines.

3. Our office surveyed the abandoned bed in 1983, plat approved November 12, 1985. The survey held, as a fixed and limiting boundary, the adjusted original meanders through the area because of an avulsion. Our review of the file for Group 657 found two documents that help explain this decision. First is a blueprint copy of a 1935 drawing identified as Federal Aid Project Number 56-F, sheet 5 of 5. The sheet shows the original channel with dashed lines and labeled "Old Channel." The second document is a 1956 edition U.S.G.S. fifteen minute quadrangle compiled from aerial photographs taken in 1954. This map shows the river flowing in the current position with the old channel identified by vegetation and intermittent water.

4. We completed certain corrections to the 1983 survey by a 1992 survey, plat approved October 20, 1993. The corrections were minor and technical in nature and did not change the fixed boundary resulting from the avulsion.

Our conclusion is that the fixed and limiting boundary identified by the 1983 survey is valid. Any unauthorized use beyond that boundary onto public lands may constitute a trespass.

(SOR, Exh. 7 April 27, 1995, Cadastral Survey Division Memorandum).

On May 9, 1995, BLM issued Dowton a notice of suspected trespass. The notice informed Dowton that he had violated Federal law by, inter alia, constructing a center pivot on public land, i.e., parcel 1, without authorization and periodically grazing his livestock on parcel 1, also without authorization. See SOR, Exh. 8. Further, BLM stated that these acts rendered Dowton liable for the fair market value rent for past use of the public lands, rehabilitation/stabilization of the damaged lands, removal of the center pivot irrigation system from the lands, and associated administrative costs. The BLM notice directed Dowton to terminate the unauthorized activities, advising him that any further use of the lands would be considered knowing and repeated willful trespass. Finally, BLM afforded Dowton 10 days to arrange settlement of the trespass liability or present evidence showing that he was not guilty of the alleged violations.

Dowton met with BLM on May 19, 1995, to discuss the May 9 notice. Dowton again stated that he believed that he owned parcel 1 and that he would do whatever he wanted with the property until BLM proved otherwise. However, Dowton proposed to settle the controversy by trading a public

corridor through his lands along the Salmon River for parcels 1-5. See SOR, Exh. 10. Dowton also requested a permit for use of the lands in exchange for the big game use of his agricultural lands. Id. In the interim, BLM agreed to evaluate the proposal and stated that Dowton could continue to irrigate the lands currently under production but could not break any new ground. See SOR, Exh. 10 (May 22, 1995, BLM Interoffice Memorandum). Thereafter, BLM summarized the May 19, 1995, meeting and Dowton's proposal in a May 31, 1995, letter to Dowton, and explicitly authorized him to continue his existing uses of the lands involved pending issuance of a final decision on the matter. See SOR, Exh. 11 (May 31, 1995, BLM letter).

By letter/decision dated June 30, 1998, which primarily addressed parcels 2-5 and led to the subsequent appeal docketed as IBLA 99-357, BLM informed Dowton that cadastral survey personnel had researched the ownership of parcel 1 and had concluded that the land was public land. Further, BLM stated that it planned to retain the land in public ownership and that, therefore, all activities had to cease and the land had to be restored to its natural condition.

In an April 22, 1999, letter summarizing a meeting between BLM and Dowton on April 1, 1999, BLM noted that the proposed resource management plan for the Challis Resource Area had identified parcel 1 for retention because of its resource values. (SOR, Exh. 12.) In that letter, BLM acknowledged Dowton's disagreement with the 1983 cadastral survey's conclusion that parcel 1 had been formed by avulsion and his claim of ownership to parcel 1, but pointed out that he had declined to meet with the BLM riparian boundary specialist to discuss the matter. Thus, BLM advised Dowton that it would continue the required legal process to have him remove the improvements placed on parcel 1, specifically the center pivot which had been installed in violation of the earlier cease and desist order, and that he would be liable for all trespass fees, including interest, when and if the parcel was determined to be public land. Additionally, BLM enclosed an unauthorized use settlement form which calculated the fair market rental fees for parcel 1 using a December 2, 1997, Idaho State Office memorandum which estimated market rents for such Federal land at $20 per ace per year. 3/ See SOR, Exh. 12 (April 22, 1999, BLM letter at 1-2).

In the June 4, 1999, notice of trespass from which this appeal was taken, BLM instituted trespass proceedings against Dowton for the unauthorized use of parcel 1, finding that he had cleared and plowed the land and had used it for agricultural and livestock grazing purposes. Citing the December 2, 1997, Idaho State Office memorandum and a May 3, 1996, appraisal, BLM assessed Dowton a total of $30,179 in fees and damages: $4,554 for the use of the public land from June 23, 1993, to June 1, 1999

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3/ The analysis was based on a market study of rents in Lemhi and Custer counties for land used for irrigated pasture and irrigated hay production when the lessee provided water and irrigation facilities.

($20/acre/year x 38.50 acres ($770/year or $64/month) x 5 years 11 months); $125 in cost recovery administrative fees; and $25,500 in damages. In the notice, BLM explained that, as documented in the 1995 appraisal, the damages represented the loss in value to the property caused by the unauthorized removal of riparian vegetation, plowing and seeding the property to alfalfa with a cover crop of oats and peas, and installation of a center pivot system ($1,350/acre before value minus $500/acre after value for a loss in value of $850/acre).

On appeal, Dowton argues that he is not subject to the trespass notice because he owns parcel 1. He disputes BLM's claim that parcel 1 was formed by avulsion and thus is Federal property, asserting to the contrary that he owns the land due to accretion. He points out that even if the land was formed by avulsion, the record contains no evidence demonstrating that BLM rather than the State of Idaho owned the land prior to the alleged avulsion or establishing the date of the alleged avulsion. Dowton further maintains that the acreage of parcel 1 has not been clearly established, with estimates ranging from 30 to 38.50 acres. In short, Dowton contends that relevant questions of fact remain as to whether parcel 1 was created by avulsion versus accretion, the size of the parcel so created, and who owned the land when the alleged avulsion occurred.

Alternatively, Dowton argues that no trespass occurred because BLM's May 31, 1995, letter specifically authorized him to use parcel 1 and asserts that BLM is estopped from denying that such authorization exists. Dowton maintains that, even if a trespass did happen, BLM overcharged for the alleged trespass because the estimated fair market rental value was excessive and the regulations do not authorize damages for the difference in the estimated value of the land before and after the trespass. Dowton contends that BLM erred in relying on the market study estimate instead of preparing a full narrative appraisal of the parcel that reflected his contributions to the rental value of the parcel, and that the agency needs to fully and accurately survey the parcel to determine its location and exact acreage. 4/

In response, BLM relies on the approved cadastral survey as the basis for its determination that parcel 1 is public land, pointing out that Dowton has never produced any documentation disputing its conclusion. Further, BLM questions whether Dowton truly believes that he owns parcel 1, noting that he agreed to exchange some of his private land for the parcel and that county tax records indicate that he has never paid property taxes on the parcel.

Although BLM acknowledges that its May 31, 1995, letter authorized Dowton to continue the existing uses on the property, it submits that this

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4/ Dowton has also submitted a motion for leave to file a color-of-title application should the Board find that BLM has title to parcel 1. Since we are referring the matter for a hearing, Dowton's motion is properly denied as premature.

authorization did not absolve him of the obligation to pay rent for use of the property. That authorization was revoked, BLM submits, in the June 30, 1998, letter which directed Dowton to cease all activities on the parcel because the agency planned to retain the parcel in public ownership, making Dowton's use of the land after that date unauthorized. Further, BLM asserts that the fair market rental value charged for use of the parcel conformed to the value estimated in the December 1997 memorandum and was not excessive because it reflected the market rate for providing only the land utilized for irrigated pasture. Additionally, BLM avers that it properly assessed damages reflecting the diminution in value of the parcel caused by the unauthorized use as established in the 1995 appraisal. As to the inconsistent acreage estimates for the parcel, BLM explains that when the unauthorized use was first discovered, the parcel was considered to contain 30 acres, more or less, but once the 1993 survey plat was approved and the acreage for lot 2 of parcel 1 calculated at 38.50 acres, it determined that, since the unauthorized use extended onto part of lot 5 as well as all of lot 2, parcel 1 contained 38.50 acres, more or less.

[1] The threshold question in this case is whether the United States owns parcel 1. Resolution of this issue turns on whether the land was formed by accretion, as Dowton claims, or by avulsion, as BLM contends. Accretion is the gradual and imperceptible addition of land along the banks of navigable or unnavigable bodies of water caused by the bit by bit deposit of solid material such as mud, sand, or sediment. Title to accreted land inures to the riparian owner. Avulsion, on the other hand, is the sudden perceptible shifting of the course of a river or stream. Title to avulsed land stays with the owner of the land before the avulsion and does not accrue to the owner of what was formerly the opposite bank. See Holly H. Baca, 97 IBLA 126, 130-31 (1987), and authorities cited. Thus, if parcel 1 was created by accretion, Dowton would own the land and there would have been no trespass; conversely, if the parcel was created by avulsion and the United States owned the land prior to the avulsion, title would remain in the United States and a trespass might have occurred.

The crucial issue of the origin of parcel 1 cannot be resolved on the record before us. Under 43 C.F.R. § 4.415, the Board has the discretionary authority to refer a case to an administrative law judge for a hearing on an issue of fact and, where there are significant unresolved factual or legal issues which cannot be determined based on the record without a hearing, the Board will exercise its discretion and refer the case to the Hearings Division, Office of Hearings and Appeals, for a hearing on those questions. See Yates Petroleum Corp., 131 IBLA 230, 235 (1994); Jerome P. McHugh & Associates (on Reconsideration), 117 IBLA 303, 307 (1991); Norman G. Lavery, 96 IBLA 294, 299 (1987); Woods Petroleum Co., 86 IBLA 46, 55 (1985). Accordingly, we set aside BLM's trespass notice and refer the case for a hearing on whether the United States owns parcel 1. See Joe S. Dent, 18 IBLA 375, 377 (1975). The scope of the hearing may also include the other issues raised by Dowton on appeal and any additional relevant matters.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is set aside and the case is referred for hearing and decision by an administrative law judge.

C. Randall Grant, Jr.
Administrative Judge

I concur:

John H. Kelly
Administrative Judge